

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**OCT 07 2005**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

SONOMA COUNTY OFFICE OF  
EDUCATION, et al.

Plaintiffs - Appellants,

v.

CALIFORNIA SPECIAL EDUCATION  
HEARING OFFICE

Defendant - Appellee,

B.H.

Real-party-in-interest - Appellee

No. 03-17291

D.C. No. CV-03-04322-WHA

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
William H. Alsup, District Judge, Presiding

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted September 15, 2005  
San Francisco, California

Before: B. FLETCHER, GIBSON<sup>\*\*</sup>, and BERZON, Circuit Judges.

The Sonoma County Office of Education appeals the district court's dismissal of its action seeking a declaration that the procedures employed by the California Special Education Hearing Office in conducting special education due process hearings violate state and federal law. The district court found the case to be moot because Sonoma County settled the underlying administrative action in which the Hearing Office employed the challenged procedures. During the pendency of this appeal, the California Department of Education determined that it would no longer contract with the Hearing Office to conduct due process hearings. We are persuaded that the Department's decision to terminate its contract with the Hearing Office renders the appeal moot. Accordingly, we dismiss the appeal.

Under the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400-1482, a parent seeking to enforce the educational rights of a disabled student may obtain an administrative hearing before a hearing officer of a state or local educational agency. From 1989 until June 30, 2005, the Hearing Office was the

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<sup>\*\*</sup> The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

sole contractor to provide these "due process" hearings for the California Department of Education.

In the present case, a parent requested a due process hearing seeking a determination of Sonoma County's educational obligations to his son. In response, the Sonoma County Office of Education and the Santa Rosa City High School District commenced this suit in federal court seeking a temporary restraining order dismissing them from the administrative proceeding on the grounds that the Hearing Office lacked jurisdiction to compel their participation. The district court denied the temporary restraining order, and the due process hearing went forward.

After several days of hearings, a mediated settlement was reached in the administrative proceeding between Sonoma County officials and the parent. The settlement resolved the substantive issues in dispute and terminated further administrative proceedings in the case. Despite the settlement, Sonoma County continued its federal action seeking a declaration as to the legality of the procedures employed by the Hearing Office in its conduct of special education due process hearings. The district court granted the Hearing Office's motion to dismiss for mootness, holding that the settlement between Sonoma County and the parent in the administrative action mooted the controversy in the federal case. Sonoma County appealed.

During the pendency of the appeal, the Hearing Office filed a "Notice of Possibility of Mootness," informing this court that the Department had entered into an interagency agreement with the California Office of Administrative Hearings to conduct its special education due process hearings. As a result, the Hearing Office was no longer the contractor for due process hearings filed after June 30, 2005, although it retained transitional duties to provide hearings in cases filed before that date. The Hearing Office's transitional duties terminate on December 31, 2005, at which time the California Office of Administrative Hearings will be solely responsible for conducting special education hearings in the State of California.

The Hearing Office contends that since it will no longer conduct special education due process hearings, federal court review of the procedures it formerly employed would be moot. An appellate court has an independent obligation to consider the mootness of an appeal. Felster Publ'g v. Burrell (In re Burrell), 415 F.3d 994, 997 (9th Cir. 2005). If an event occurs during the pendency of the appeal that renders ineffective the declaratory relief sought, the appeal must be dismissed as moot. See, e.g., Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 791, 798 (9th Cir. 1999)(student's graduation mooted claims for declaratory and injunctive relief in Establishment Clause challenge to school district policy of permitting student prayers at graduation ceremonies); Harrison W. Corp. v. United

States, 792 F.2d 1391 (9th Cir. 1986) (signing of second contract concerning same subject matter mooted dispute over the first). Such an event occurred in this case when the California Department of Education decided to stop using the Hearing Office to conduct its due process hearings. As a result of this decision, the declaration Sonoma County seeks would be wholly without effect as the County will no longer be subjected to the challenged procedures and the Hearing Office will no longer conduct special education hearings. Therefore, the County's appeal is moot and must be dismissed.

Sonoma County seeks to avoid this result by speculating that it could be subject to the challenged procedure at some unspecified point in the future. To avoid dismissal of an otherwise moot case, the burden is firmly on the County to demonstrate a "very significant possibility" that it will again be subject to the specific injury for which it seeks declaratory relief. Nelsen v. King County, 895 F.2d 1248, 1250-51 (9th Cir. 1990)(quoting Sample v. Johnson, 771 F.2d 1335, 1343 (9th Cir. 1985)). Here, it is highly doubtful, if not impossible, that the County will ever again be subject to the challenged procedures. It is undisputed that the County had no hearings pending before the Hearing Office as of June 30, 2005, nor will it before the end of the Hearing Office's transitional duties on December 31, 2005. While there is at least a hypothetical possibility that the

Hearing Office may one day reapply and be awarded the contract to conduct special education due process hearings and then choose to employ the exact same challenged procedures, this remote possibility, subject to contingencies outside the Hearing Office's control, falls well short of the "significant possibility" the County must establish to survive dismissal. See Nelsen, 895 F.2d at 1250-51.

In its final effort to evade dismissal, Sonoma County characterizes the issues it raises as "capable of repetition while evading review." This exception to the mootness doctrine applies only in the exceptional circumstances where a particular challenge is "so inherently limited in duration that the action will become moot before completion of appellate review." Doe, 177 F.3d at 798 (quoting Di Giorgio v. Lee (In re Di Giorgio), 134 F.3d 971, 975 (9th Cir. 1998)). To enjoy the benefit of this exception, the County must demonstrate that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Pub. Utils. Comm'n of Cal. v. FERC, 100 F.3d 1451, 1459 (9th Cir. 1996) (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982)).

Sonoma County claims that the challenged procedures are "capable of repetition" because other school districts with cases filed on or before June 30,

2005 may appear before the Hearing Office before the December 31, 2005

transition to the State Office of Administrative Hearings. However, the fact "[t]hat other persons may litigate a similar claim does not save a case from mootness."

Sample, 771 F.2d at 1339. Rather, the complaining party must demonstrate that it, and not merely others similarly situated, would be subject to the same action again.

Id. Sonoma County can make no such showing.

For the foregoing reasons the appeal is **DISMISSED**.